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STATE OF ARKANSAS

Office of the Attorney General

Winston Bryant
Attorney General

July 21, 1997

Telephone:
(501) 682-2007

The Honorable William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE:	In the Matter Of MCI Telecommunications Co., Inc. Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 pursuant to §§ 251, 252, and 253 of the Communications Act of 1934, as amended	CC Docket No. 97-100

Dear Mr. Caton:

Enclosed for filing in the above-captioned matter please find the original and twelve (12) copies of the Reply Comments of the Arkansas Attorney General.

Also enclosed is an extra copy that I request be marked "Filed" and returned to the Arkansas Attorney General's office in the enclosed, self-addressed, postage pre-paid envelope. Thank you for your assistance and cooperation in this matter.

WINSTON BRYANT
Attorney General

By: Kelly S. Terry
David R. Raupp
Senior Assistant Attorney General

Vada Berger
Assistant Attorney General

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OHR

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter Of	)	
	)	
MCI Telecommunications Co., Inc.	)	
	)	CC Docket No. 97-100
Petition for Expedited Declaratory Ruling	)	
Preempting Arkansas Telecommunications	)	
Regulatory Reform Act of 1997 pursuant to	)	
§§ 251, 252, and 253 of the Communications	)	
Act of 1934, as amended	)	

Reply Comments of the Arkansas Attorney General

WINSTON BRYANT
ATTORNEY GENERAL

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MCI Telecommunications Corporation ("MCI") has petitioned the Commission for an expedited declaratory ruling preempting several provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("the Arkansas Act").[1] MCI asserts that the Commission should exercise its discretion to preempt the Arkansas Act because it "erects a series of barriers to local competition that are flatly inconsistent"[2] with the provisions of the Telecommunications Act of 1996 ("the Federal Act" or "1996 Act").[3] In its initial Comments on the MCI Petition, the Attorney General explained that MCI's request for preemption is not warranted because MCI fails to show that the statutory requirements for preemption pursuant to §§ 253 and 252(e)(5) of the 1996 Act have been satisfied and because the preemption that MCI seeks exceeds the Commission's authority.

As with its comments in response to the original petition in this docket that seeks preemption of the Arkansas Act, which was filed by American Communications Services, Inc.,[4] the Attorney General, along with several other parties, has again provided its views on the scope of the Commission's preemption authority and the alleged existence of

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[1] 1997 Ark. Acts 77, effective February 4, 1997.

[2] In the Matter of MCI Telecommunications Co., Inc., Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 pursuant to §§ 251, 252, and 253 of the Communications Act of 1934, as amended, CC Docket 97-100 (hereinafter "MCI Petition"), at 6.

[3] Pub. L. 104-104, 110 Stat. 56.

[4] In the Matter of American Communications Services, Inc.'s Petition for Expedited Declaratory Ruling Preempting Arkansas Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended, CC Docket No. 97-100.

irreconcilable conflicts between the Arkansas Act and the Federal Act that justify preemption. Because these issues have been thoroughly discussed in the preceding rounds of comments, the Attorney General will not discuss them at length in these Reply Comments. Rather, the Attorney General takes this opportunity to point out that some of the jurisdictional issues raised in this proceeding have been clarified by the recent ruling of the United States Court of Appeals for the Eighth Circuit in Iowa Util. Bd. v. FCC[5] and to address a new argument raised by Bell Atlantic and NYNEX in their opposition to MCI's petition.

In its initial Comments, the Attorney General stated its view that the Commission has limited preemption authority under the 1996 Act because Congress did not intend to abrogate the traditional role that states have played in telecommunications regulation. The Attorney General pointed out that, in passing the 1996 Act, Congress did not abolish the regulatory distinction between interstate and intrastate telecommunications services created by §§ 151 and 152 of the original Communications Act of 1934.[6] The Eighth Circuit recently reinforced this view in Iowa Util. Bd. by holding that the Commission exceeded its jurisdiction by promulgating pricing rules for interconnection, unbundled access, and resale because those matters are "fundamentally intrastate in character."[7] In reaching this conclusion, the court unequivocally affirmed the continued vitality of § 152(b) of the Federal Act, reiterating that § 152(b) limits the Commission's regulation of

[5]No. 96-3321, slip op. (8th Cir. July 18, 1997).

[6]47 U.S.C. §§ 151, 152.

[7]Iowa Util. Bd., slip op. at 15-16.

intrastate telecommunications services.[8] The court noted further that "a federal statute's mere application to intrastate telecommunications matters is insufficient to confer intrastate jurisdiction upon the FCC"[9] and that, to overcome § 152(b)'s prohibition, Congress must directly grant the Commission intrastate regulatory authority.[10] Because Congress chose not to do so in the 1996 Act, § 152(b) "remains a Louisiana-built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf."[11]

The Eighth Circuit's opinion in Iowa Util. Bd. also refutes the contention, which is at least implicit in MCI's petition, that the Commission possesses a general preemption authority to invalidate state laws simply because they are inconsistent with its regulations. The court rejected, as an unreasonable interpretation of the Federal Act, the Commission's argument that "merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient for the FCC to preempt that state rule."[12] This ruling is consistent with the Attorney General's contention in its initial Comments that the Commission has no preemption authority beyond that expressly conferred upon it by §§ 253(d) and 252(e)(5) of the 1996 Act.

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[8] Id. at 13.

[9] Id.

[10] Id.

[11] Id. at 16.

[12] Id. at 27.

In addition, Bell Atlantic and NYNEX point out, and the Attorney General agrees, that MCI misinterprets the limited preemption authority granted by § 253(d).[13] Contrary to MCI's assertion, § 253 does not authorize the Commission to preempt state or local statutes, regulations, or legal requirements that present "barriers to entry," that "significantly deter[] or burden[] potential new competitors[,]" or that "disadvantage" competing carriers.[14] Rather, §§ 253(a) and 253(d) authorize the preemption of state or local laws only if they "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[15] The plain language of the statute thus indicates that Congress authorized the Commission to preempt a state statute or regulation only in the rare circumstance in which that law essentially prevents a carrier from providing a telecommunications service. To the extent that MCI suggests that § 253(a) imposes a lower standard for preemption, it is mistaken.

Moreover, as the Attorney General pointed out in its initial Comments, MCI has not demonstrated that any of the provisions of the Arkansas Act that it challenges have the effect of prohibiting it from providing any telecommunications service. Thus, for the reasons stated herein and in its initial Comments, the Attorney General respectfully requests that the Commission deny MCI's petition for a declaratory ruling preempting the Arkansas Act.

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[13]Opposition of Bell Atlantic and NYNEX, at 1-2.

[14]MCI Petition, at 4-5.

[15]47 U.S.C. § 253(a).

Respectfully submitted,

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